No. 80-195

In the Supreme Court of the United States

OCTOBER TERM, 1980

METROMEDIA, INC., ET AL., APPELLANTS

v.

CITY OF SAN DIEGO, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a municipal ordinance, adopted to improve the appearance and economic condition of the city and to promote traffic safety, that generally bans the construction or maintaining of billboards advertising activities occurring off the premises on which the billboards are located, violates the Fourteenth Amendment because it is in excess of the city's police power.

2. Whether such an ordinance, when construed to apply only to billboards and comparable permanent structures used for the display of commercial or other advertising to the public, is invalid on its face under the First Amendment, even though the highest court of the State contemplated that particular applications of the ordinance could be challenged where an advertiser can demonstrate that he has no reasonable alternative means of proclaiming his message to the public.

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INTEREST OF THE UNITED STATES

At stake is the validity of a municipal ordinance which generally bans commercial billboards within the City of San Diego, California. By enacting a community-wide ban on billboards, San Diego joined a trend embracing many jurisdictions—including some 100 localities in California, and the entire States of Hawaii, Maine and Vermont. Congress has, in some measure, encouraged this trend by requiring the states to eliminate billboards from areas adjacent to certain highways constructed with federal funds or to forfeit a percentage of those funds. Highway Beautification Act of 1965, Pub. L. No. 89-285, 79 Stat. 1028, 23 U.S.C. 131.[1] The validity of the federal billboard program is not directly involved in this case because appellants seek to erect or maintain billboards only in commercial or industrial zones of the City—areas which the federal Act largely leaves to state regulation. 23 U.S.C. 131(b). Nevertheless, the decision in this case may have a substantial impact on various aspects of the federal program.[2]

STATEMENT

1. Ordinance No. 10795 (San Diego Cal. Municipal Code §§ 101.0700-101.8702 (1972); J.S. App. 104a-118a) was adopted by the San Diego City Council in 1972. It generally bans all "outdoor advertising display signs" throughout the City except those signs that advertise

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[1] The federal government also has banned billboards on federal lands (43 C.F.R. 2921.0-6(a)). Congress' control of the use of its own land under the Property Clause of the Constitution (Art. IV, § 3, Cl. 2) is not implicated in this case.

[2] The Interstate System and primary system of highways receiving federal aid are described in 23 C.F.R. 470.105(a) and (b). See also 23 C.F.R. 470.107. These two systems comprise about eight percent of all highways in the United States and most of the major interstate highways. Federal Highway Administration, U.S. Department of Transportation, *Highway Statistics—1979* 106, 139 (1980).

goods produced or services rendered on the premises upon which the sign is located or identify the owner or occupant of the premises (§ 101.0700B; J.S. App. 107a). The term "outdoor advertising display signs" is not defined in the ordinance. However, the Supreme Court of California adopted a narrow construction of the term that limits coverage to " 'rigidly assembled, * * * permanently affixed' " signs or structures " 'constituting, or used for the display of, a commercial or other advertisement to the public' " (J.S. App. 4a n.2).[3] In the court's view, this construction fulfills the City's evident purpose of banning billboards and similar permanent structures used predominantly for commercial advertising, without touching signs of a "very different" character such as "a picket sign announcing a labor dispute or a small sign placed in one's front yard proclaiming a political or religious message" (J.S. App. 4a n.2).

In addition to the general exclusion of outdoor advertising signs relating to activities on the premises, the ordinance contains a number of specific exceptions for other types of displays: government signs; bench signs located at public transit stops; commemorative historical plaques; religious symbols; signs located in shopping malls; signs designating the premises for sale or lease; certain advertising on vehicles; signs depicting time, temperature, and news; and temporary political campaign signs (§ 101.0700F; J.S. App. 111a-112a).[4] All

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[3] The definition adopted by the California Supreme Court, drawn from the state tax code, provides in full that an "outdoor advertising display" is " 'a rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public' " (J.S. App. 4a n.2, quoting Cal. Rev. & Tax. Code § 18090.2 (West 1970)).

[4] The ordinance, as originally adopted in 1972, did not contain the exception for political signs. That exception was added by an amendment in 1977 (J.S. App. 3a n.1). The California Supreme Court concluded (*ibid.*) that this amendment may have been prompted by the Ninth Circuit's decision in *Baldwin* v. *Redwood*

existing nonconforming signs are to be removed in accordance with an abatement schedule that takes into account the original cost of the sign and the number of years it has been standing (§ 101.0700D; J.S. App. 108a-109a); but see note 9, *infra*.

2. Appellants Metromedia, Inc. and Pacific Outdoor Advertising Co., Inc., two advertising companies that own a substantial number of billboards in San Diego,[5] challenged Ordinance No. 10795 in California Superior Court on a number of grounds. All of the billboards owned by appellants that are subject to removal under Ordinance No. 10795 are located in areas of the City zoned for commercial and industrial purposes (J.S. App. 123a), which comprise approximately three percent of the total area of the City (*id.* at 121a). Even prior to adoption of Ordinance No. 10795 in 1972, billboards were not permitted in areas of the City zoned for other purposes (J.S. App. 17a).[6]

Prior to trial in the Superior Court, the parties stipulated to certain facts respecting the outdoor advertising industry and the effects the ordinance would have on appellants' advertising business in San Diego (J.S. App.

City, 540 F.2d 1360 (1976), cert. denied, 431 U.S. 913 (1977), which held unconstitutional a local ordinance imposing stringent restrictions on political signs.

[5] The Joint Stipulation of Facts entered into by the parties states that each of the appellants owns "a substantial number of outdoor advertising displays (approximately 500 to 800) in the City of San Diego" (J.S. App. 122a).

[6] This parallels a similar distinction contained in the federal Highway Beautification Act of 1965, 23 U.S.C. 131. The federal Act requires the states to maintain effective control of outdoor advertising displays adjacent to highways in the Interstate System and primary system as a condition of receiving their full share of federal funding for those systems. Although the states generally must prohibit such displays within 660 feet of the right-of-way (and beyond that to the limits of visibility in nonurban areas) 23 U.S.C. 131(b), displays may be permitted within 660 feet of the right-of-way, subject to certain limitations, in areas of the state that are

123a-127a). Outdoor advertising is presented in two basic standardized forms—a "poster panel," measuring 12 x 24 feet, on which a pre-printed message is posted in sheets, and a "painted bulletin," generally 14 x 48 feet, which contains a hand painted message (J.S. App. 125a). See generally C. Floyd & P. Shedd, *Highway Beautification: The Environmental Movement's Greatest Failure* 21-40 (1979). The billboards are made available to "all-comers" to carry commercial advertising and other messages,[7] and the copy on any particular billboard usually changes each month (J.S. App. 123a). The signs

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zoned for commercial or industrial purposes. 23 U.S.C. 131(d). Appellants have not sought in this lawsuit authorization to construct billboards outside of those sections of San Diego that are zoned for commercial and industrial purposes (see Br. i (Question 1), 29, 33); they seek only the invalidation of Ordinance No. 10795, which has the effect of extending to commercial and industrial areas the ban on billboards that existed elsewhere in the City prior to 1972. Thus, this case does not involve a challenge to a state law or local ordinance, enacted to comply with the requirements of the federal Act, that eliminates billboards adjacent to the right-of-way of Interstate or primary highways in nonurban areas or in residential or other noncommercial and nonindustrial areas of a city or town.

[7] The record does not disclose what percentage of the displays on appellants' billboards are political, social, or similar messages, as distinguished from commercial advertising of goods and services; under what circumstances a fee is charged for noncommercial messages; or what percentage of appellants' revenues is derived from commercial and noncommercial advertising, respectively. In the litigation involving the Maine billboard statute, however, the court found that 24% of the messages carried by one of the plaintiff advertising companies and five percent carried by the other were noncommercial in nature. *John Donnelly & Sons* v. *George N. Campbell, Jr.*, No. 79-1575 (1st Cir. Dec. 22, 1980), slip op. 25. Significantly, the space for the noncommercial messages made available by the former advertiser was largely donated by the company (*id.* at 27 n.13), presumably because the space could not be leased to a paying customer. We note in this regard that, in areas subject to the federal Act, certain exceptions for nonconforming signs may be lost if the signs are abandoned or carry obsolete or no advertising for a certain period. 23 C.F.R. 750.707 (d) (6).

maintained by the outdoor advertising industry seldom advertise goods or services that are sold or made available on the premises on which the sign is located or that are offered by the owner of the sign (*ibid.*). Substantially all of the billboards owned by appellants are located on property leased from others for the purpose of maintaining outdoor advertising displays thereon (*id.* at 122a).

Finally, the parties stipulated that "[m]any businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitally expensive" (J.S. App. 126a). The stipulation does not indicate, however, what meaning the word "many" was intended to convey, either in absolute numbers of companies and individuals or as a percentage of all advertisers, of all purchasers or users of billboard space, or of all displays in place in a given month.[8]

3. On cross-motions for summary judgment, the Superior Court held that the ordinance is an unreasonable exercise of the police power and an abridgement of freedom of speech (J.S. App. 87a, 96a-97a), and it enjoined the City from enforcing the ordinance to prevent appellants from erecting, maintaining, or using their billboards (*id.* at 100a). The California Court of Appeal affirmed on the ground that the ban on billboards is in excess of the City's police power (*id.* at 65a-80a). The Court of Appeals therefore declined to consider appellants' First Amendment and other arguments (*id.* at 80a).

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[8] We note, for example, that in the years 1976 through 1978, only 1.1% of all advertising expenditures were for outdoor advertisements. Bureau of the Census, U.S. Department of Commerce, *Statistical Abstract of the United States* 545 (1979). See also *John Donnelly & Sons* v. *George N. Campbell, Jr.*, No. 79-1575 (1st Cir. Dec. 22, 1980), slip op. 26-27. The stipulation respecting the preference of "many" persons for outdoor advertising therefore would appear to be of little utility in resolving the constitutional questions presented. See also pages 27-29, *infra*.

The California Supreme Court reversed. It first held (J.S. App. 6a-18a) that the elimination of traffic hazards and improving the appearance of the city are proper objectives for the exercise of the city's police power and that the billboard ordinance is reasonably related to these purposes. The court also concluded (*id.* at 18a-26a) that the ordinance, on its face, does not impermissibly abridge freedom of speech in violation of the First Amendment and the state constitution. "The possibility that the ordinance may impede an occasional advertiser from communicating his message to the public," the court reasoned, "is not sufficient to invalidate the ordinance *on its face*" (J.S. App. 23a n.14; emphasis in original). The court noted that "an advertiser retains the ability to assert that, owing to the absence of reasonable alternative means of communication, the ordinance cannot constitutionally *be applied* to prevent him from using a billboard to proclaim his message" (*ibid.*; emphasis in original).

In addition to rejecting appellants' First Amendment and police power arguments, the California Supreme Court sustained the constitutionality of the abatement schedule set forth in the ordinance on its face, but left it open to appellants to show that the amortization period is unreasonably short as applied to some or all of the structures for which they will not otherwise receive compensation (J.S. App. 40a-47a).[9] Appellants have not sought review of the amortization question in this Court.

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[9] On a nonconstitutional issue, the California Supreme Court held (J.S. App. 26a-40a) that the ordinance is preempted by the California Outdoor Advertising Act (Cal. Bus. & Prof. Code §§ 5200 *et seq.* (West 1974)) to the extent it requires removal without compensation of signs adjacent to highways for which state law must furnish compensation as a condition to receipt of federal highway funds. See 23 U.S.C. (Supp. II) 131(g). The City's petition for a writ of certiorari on this question is now pending. *City of San Diego* v. *Metromedia, Inc.*, No. 80-196.

SUMMARY OF ARGUMENT

I

San Diego Ordinance No. 10795, which prohibits commercial billboards and comparable permanent structures used for the display of advertising that does not relate to activities on the premises, plainly is a legitimate exercise of the City's police power. The ordinance was adopted to improve the appearance of the City—and thereby to attract visitors, promote the City's economic well-being, and protect public and private investment in buildings and open space—and to further traffic safety. These are indisputably proper goals for the exercise of the police power. Indeed, this Court long has recognized that billboards pose special problems justifying government regulation.

Elimination of off-premise billboards will permit more peaceful enjoyment of surroundings and improve the environment. Moreover, because, as the California Supreme Court observed, billboards "are intended to, and undoubtedly do, divert a driver's attention from the roadway" (J.S. App. 7a), the San Diego City Council reasonably could conclude that this intended distraction constitutes a traffic hazard. Nor is the validity of the environmental and safety justifications for the ordinance undercut by the fact that the ordinance permits signs advertising goods and services available on the premises. The City reasonably could conclude that these signs do not pose the same environmental and safety problems. In any event, the City was not required to take an all-or-nothing approach.

II

The San Diego billboard ordinance is fully consistent with the First Amendment. Although the ordinance may have the effect of eliminating appellants' *business* of offering advertising space on their billboards, the ordinance does not bar all advertising or expression of ideas through outdoor signs and posters. Therefore, contrary

to appellants' contention, this medium of expression is preserved, but in a manner that prohibits large, permanent signs in order to further important environmental and safety concerns.

A. Billboards present unique problems and cannot be compared to leaflets, door-to-door solicitation, or even the use of sound trucks. Unlike leaflets, the information on billboards cannot be given only to willing recipients, and billboards cannot, like leaflets, be viewed and then neatly discarded out of the view of other members of the public who desire an uncluttered landscape. Although sound trucks may reach unwilling recipients, they are not, like billboards, a permanent fixture of the environment. And given the number, obtrusiveness, and permanence of billboards, it is not fair to suggest that an unwilling viewer simply avert his eyes.

Nor can the erection of billboards along public thoroughfares be compared to the use of sidewalks and parks for assembly and discussion of ideas. Billboards afford no opportunity for the assembly or personal intercourse inherent in the use of parks or sidewalks as forums of expression. Public thoroughfares are constructed with the use of public funds for the far more limited purpose of furnishing a means of transportation.

B. The billboard ordinance is a reasonable regulation of the manner and place of advertising. The ordinance, on its face, leaves untouched reasonable alternatives for advertising, including broadcast and print media, on-premise billboards, temporary and less obtrusive signs and posters on one's property or elsewhere expressing political and other messages, and leafleting. In any event, the California Supreme Court contemplated that individual advertisers who genuinely do not have reasonably available alternatives could bring an action challenging the ordinance as applied.

The ordinance also does not regulate on the basis of content. Although signs offering goods and services for sale on the premises, and offering the premises themselves for sale, are permitted, this is a regulation based

on the *place* of the advertising, not its content. On-premise advertising is a reasonable incident to the use and ownership of the property and is often necessary for the public to locate the merchandise or real estate for sale.

ARGUMENT

I

THE ORDINANCE BANNING BILLBOARDS IS NOT AN UNCONSTITUTIONAL EXERCISE OF THE POLICE POWER

Appellants contend (Br. 33-45) that Ordinance No. 10795 is an unconstitutional exercise of the police power of the City of San Diego. Appellants do not suggest that the City must permit them to place billboards in those areas outside of the City's commercial and industrial zones where they do not now have display signs and where such signs were prohibited even before Ordinance No. 10795 was adopted in 1972.[10] Moreover, they do not argue here, as they did in the California courts (J.S. App. 87a-98a; cf. *id.* at 41a-46a), that the ordinance is in excess of the police power because, although it purports to be regulation to further the public welfare, it results in a taking of their property without just compensation. See *Kaiser Aetna* v. *United States*, 444 U.S. 164, 172, 174-175 (1979). Thus, appellants' argument is that Ordinance No. 10795 exceeds what they perceive to be limitations placed upon the City's police power by the Due Process Clause of the Fourteenth Amendment because it results in a complete prohibition of billboards, and, thereby, the elimination of the outdoor commercial advertising business in the City.[11]

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[10] Thus, as we have noted (see note 6, *supra*), they do not seek to erect or maintain billboards in areas of the City where, if they were within 660 feet of the right-of-way of an interstate highway or primary road, their presence would conflict with the requirements of the federal Highway Beautification Act of 1965.

[11] Actually, appellants contend (Br. 33) that the issue here is whether the police power of the City can be interpreted to authorize

A. The Ordinance Furthers The Substantial Public Interest In Improving The Environment Of The City

The scope of the retained governmental authority of the states—"what traditionally has been known as the police power," *Berman* v. *Parker*, 348 U.S. 26, 32 (1954) —is plenary. The definition of its scope "is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive" (ibid.).

In the present case, the City Council of San Diego adopted an ordinance to further the general welfare by eliminating what was considered to be a visual blight caused by the presence of commercial billboards in the City. Among the stated purposes of the Council in banning these structures were to "preserve and improve the appearance of the City as a place in which to live and work"; "to protect an important aspect of the economic base of the City by preventing the destruction of the natural beauty and environment of the City, which is instrumental in attracting nonresidents who come to visit, trade, vacation or attend conventions"; and to enhance property values and protect public and private investment in buildings and open spaces (§ 101.0700A; J.S. App. 106a).

It is now settled that attainment of aesthetic goals is a proper objective for the exercise of the police power. As the Court stated in *Berman* v. *Parker*, *supra:*

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It

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a complete prohibition of outdoor advertising. This characterization of the ordinance is incorrect. On-site advertising is permitted under the ordinance, as is, *e.g.*, advertising on commercial vehicles and benches at transit stops, as well as the display of messages on posters, placards, and temporary signs (see pages 18-20, *infra*).

> is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

348 U.S. at 33; citation omitted. Accordingly, the Court has long recognized the legitimacy of governmental efforts to protect against the "ill-effects of urbanization" (*Agins* v. *City of Tiburon*, No. 79-602 (June 10, 1980), slip op. 5; see also *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 9 (1974); *Village of Euclid* v. *Ambler Co.*, 272 U.S. 365, 394-395 (1926)), including the enactment of "land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 129 (1978).

Ordinance No. 10795 is reasonably related to accomplishing the aesthetic and environmental goals described above and therefore is well within the reach of the City's police power. See *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 124-125 (1978); *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-595 (1962). Indeed, this Court has long recognized that billboards pose special problems justifying government regulation. See *Packer Corp.* v. *Utah*, 285 U.S. 105, 110 (1932); *St. Louis Poster Advertising Co.* v. *City of St. Louis*, 249 U.S. 269, 274 (1919); *Thomas Cusack Co.* v. *City of Chicago*, 242 U.S. 526, 529-530 (1917); cf. *Fifth Avenue Coach Co.* v. *City of New York*, 221 U.S. 467, 482-483 (1911). Billboards often stand starkly apart from and out of harmony with their surroundings; in fact, their messages are *designed* to draw the viewer's attention from surrounding sights. As a result, billboards are intrusive upon the private thoughts and sensibilities of those in the proximity, because they are thrust "before the eyes of observers * * * to be seen without the exercise of choice or volition." *Packer Corp.* v. *Utah*, *supra*, 285 U.S. at 110, quoted in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302 (1974) (opinion of Blackmun, J.). See also *Lehman* v. *City of Shaker Heights*, *supra*, 418 U.S. at 306-307

(Douglas, J., concurring); cf. *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748-749 (1978); *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 469 (1952) (Douglas, J., dissenting); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949). Congress made legislative findings to the same effect when it enacted the Highway Beautification Act of 1965, concluding that erection and maintenance of outdoor advertising signs adjacent to highways in the Interstate and primary systems should be controlled in order "to promote the * * * recreational value of public travel, and to preserve natural beauty." 23 U.S.C. 131(a).

Nor is the San Diego ordinance defective because it had the effect of extending a pre-existing ban on off-site billboards to commercial and industrial areas. The City Council reasonably could conclude that residents of or visitors to commercial and industrial areas should be entitled, to the extent possible, to the same benefits of an aesthetically pleasing environment that individuals in other areas enjoy. *John Donnelly & Sons* v. *Mallar*, 453 F.Supp. 1272, 1281 (D. Me. 1978), rev'd on other grounds, *John Donnelly & Sons* v. *George N. Campbell, Jr.*, No. 79-1575 (1st Cir. Dec. 22, 1980). "[T]o conclude that an area is too unattractive to justify aesthetic improvement would be both unreasonable and illogical." 453 F. Supp. at 1282, quoting *John Donnelly & Sons* v. *Outdoor Advertising Board*, 369 Mass. 206, 224, 339 N.E. 2d 709, 720 (1975); see also *E. B. Elliott Advertising Co.* v. *Metropolitan Dade County*, 425 F.2d 1141, 1152 (5th Cir.), cert. dismissed, 400 U.S. 805 (1970).[12] "Urban dwellers, as well as country residents and travelers have an interest in the quality of their surroundings. * * * Moreover, to designate one area as, so to speak,

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[12] This is not to say, of course, that a city could not choose to allow billboards in commercial and industrial zones, as the federal Highway Beautification Act of 1965 permits. The Fourteenth Amendment does not require an all-or-nothing approach. See, *e.g.*, *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976); *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 110 (1949).

second class, might not only inspire complaints, but would tend to impede improvement." *John Donnelly & Sons* v. *George N. Campbell, Jr., supra*, slip op. 18; citations omitted.

The aesthetic goals of the ordinance are not only important in their own right. Improvement of the appearance of the City and preservation of its natural and scenic beauty through elimination of billboards was expected to attract tourists and other visitors [13] and to protect and enhance property values in the area (J.S. App. 106a). Promoting the economic well-being of the community is indisputably a proper governmental function. See *John Donnelly & Sons* v. *George N. Campbell, Jr., supra*, slip op. 14, 16-17. This justification for the ordinance applies equally in commercial and industrial zones: the City Council "might reasonably conclude that just as the scenic beauty of country and coastal areas promotes tourism, improving the aesthetic quality of business districts helps attract new businesses and contributes to general economic development." *John Donnelly & Sons* v. *Mallar, supra*, 453 F. Supp. at 1281-1282; cf. *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 75 (1976) (Powell, J., concurring).[14]

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[13] See *Penn Central Transp. Co.* v. *New York City, supra*, 438 U.S. at 109.

[14] The ordinance also serves to protect the public and private investment in buildings and open space, the value of which may be diminished by the erection or maintenance of billboards. The federal Highway Beautification Act of 1965 was intended to advance a comparable purpose: "to protect the public investment in [interstate and primary] highways." 23 U.S.C. 131(a). The Interstate System, in particular, was designed to harmonize with surrounding natural terrain, and it affords users of the highways a feeling of spaciousness because of the absence of the uncontrolled roadside development that had often plagued other highways. The public investment in aesthetically pleasing highways could be lost through uncontrolled roadside development, perhaps even leading to premature obsolescence of highways because of the diminished value of the land through which they pass. See generally *Safety and Environmental Design Considerations in the Use of Commercial Electronic Variable-Message Signage* 2-3, 22-23, 60-68 (1980), report

B. The Ordinance Is Reasonably Related To The Purpose Of Protecting The Safety Of Pedestrians And Motorists

The City Council also determined that the ordinance would promote the safety of pedestrians and motorists (§ 101.0700A; J.S. App. 106a). Congress made similar legislative findings when it enacted the Highway Beautification Act of 1965, concluding that the erection and maintenance of outdoor advertising signs should be controlled in order "to promote the safety * * * of public travel." 23 U.S.C. 131(a).

We take it as a given, and appellants do not dispute, that the City has a compelling interest in promoting the safety of pedestrians and motorists. But appellants contend (Br. 41-43) that the ordinance is not reasonably related to this objective because the City did not offer evidence of a link between traffic accidents and billboards.[15]

As an initial matter, it must be noticed that it is appellants, not the City, who have the burden of proof with respect to the reasonableness of the ordinance in this regard. *Goldblatt* v. *Town of Hempstead, supra*, 369 U.S. at 596. In any event, as the California Supreme Court observed (J.S. App. 7a), billboards "are intended to, and undoubtedly do, divert a driver's attention from the roadway." Cf. *Ginzburg* v. *United States*, 383 U.S. 463 (1966). The San Diego City Council reasonably

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prepared for the Federal Highway Administration, U.S. Department of Transportation. (We are lodging a copy of this volume, which collects various studies, with the Clerk of the Court). See also S. Doc. No. 6, 90th Cong., 1st Sess. 28-29, 32-34 (1967).

[15] The fact that the City did not identify particular instances in which billboards led to accidents does not undercut the legislative judgment, no doubt informed by common sense, that they do so in a necessarily indeterminate number of cases. Accidents may frequently be caused by a momentary, even subconscious distraction that the individual may not recall (much less disclose) after the trauma of the accident. See generally *Safety and Environmental Design Considerations, supra*, note 14, at 23-46 (collecting safety studies).

could determine that this conceded diversion constitutes a traffic hazard that may lead to accidents in some cases.

A determination as to what measures are reasonably necessary to promote safety inevitably involves weighing and predictive elements and is, as a result, "essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives." *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Rock Island & Pacific* R.R., 393 U.S. 129, 138 (1968). It necessarily follows that, in constitutional adjudication involving the reasonableness of safety legislation such as this, a court may not—as appellants urge this Court to do—"reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than * * * 'pure speculation.'" 393 U.S. at 139, quoted in *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979). As this Court stated when considering a nearly identical issue in the context of a New York City ordinance banning certain vehicular advertisements:

> The [State court] concluded that advertising on vehicles using the streets of New York City constitutes a distraction to vehicle drivers and to pedestrians alike and therefore affects the safety of the public in the use of the streets. We do not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom. We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false.

Railway Express Agency, Inc. v. *New York*, *supra*, 336 U.S. at 109; footnote and citation omitted.[16]

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[16] See also *Veterans of Foreign Wars* v. *City of Steamboat Springs*, 195 Colo. 44, 50-52, 575 P.2d 835, 840-841, appeal dismissed,

Appellants contend (Br. 42-43) that the safety rationale is insufficient because signs that are permitted under the ordinance may also interfere with traffic safety. The premise underlying that argument is debatable. Billboards identifying a commercial site or advertising activities occurring there may, in general, be more in harmony with their surroundings and typically are more permanent displays to which motorists might become accustomed over time; the displays carried on appellants' "off-site" billboards, in contrast, ordinarily are changed monthly (J.S. App. 123a-124a), thereby creating a fresh distraction. Similarly, signs on commercial vehicles might reasonably be thought to pose less of a threat to traffic safety because drivers are expected to be paying attention to other vehicles in any event. See *Railway Express Agency, Inc.* v. *New York*, *supra*, 336 U.S. at 110; but see *John Donnelly & Sons* v. *George N. Campbell, Jr.*, *supra*, slip op. 13.

Even assuming the soundness of appellants' factual premise, however, the City of San Diego was not required to take an all-or-nothing approach to billboard regulation. *Railway Express Agency, Inc.* v. *New York*, *supra*, 336 U.S. at 110; *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976). There are strong countervailing interests in allowing signs identifying or advertising goods sold or activities occurring on the premises that do not exist for appellants' "off-site" billboards. On-premise signs are "in actuality a part of the business itself, just as the structure housing the business is a part of it" (*United Advertising Corp.* v. *Borough of Raritan*, 11 N.J. 144, 150, 93 A.2d 362, 365 (1952) (Brennan, J.), and the City Council could choose to allow such signs as

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439 U.S. 809 (1978); *Newman Signs, Inc.* v. *Hjelle*, 268 N.W. 2d 741, 757, 761 (N.D. 1978), appeal dismissed, 440 U.S. 901 (1979); *Markham Advertising Co.* v. *State*, 73 Wash. 2d 405, 420-422, 439 P.2d 248, 258-259 (1968), appeal dismissed, 393 U.S. 316 (1969); *E. B. Elliott Advertising Co.* v. *Metropolitan Dade County*, *supra*, 425 F.2d at 1151-1152; *Moore* v. *Ward*, 377 S.W.2d 881, 883-884 (Ky. 1964); *New York State Thruway Auth.* v. *Ashley Motor Court, Inc.*, 10 N.Y. 2d 151, 176 N.E.2d 566, 218 N.Y.S. 2d 640 (1961).

an incident to use of the land for the advertised purpose. *Ibid.* On-premise signs often are also essential for informational purposes to enable the motorist to locate the commercial establishment. Signs advertising goods or services offered elsewhere have no such necessary nexus to the property regulated by the ordinance. In addition, the City reasonably might conclude that expression of the owner's own message on his own property is a sufficiently important attribute of ownership to warrant protection in the ordinance,[17] unlike the ability to lease out the same space to others. *Railway Express Agency, Inc.* v. *New York, supra,* 336 U.S. at 115-117 (Jackson, J., concurring).[18]

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[17] Cf. *Pruneyard Shopping Center* v. *Robins,* No. 79-289 (June 9, 1980), slip op. 10-13; *Wooley* v. *Maynard,* 430 U.S. 705 (1977); *Spence* v. *Washington,* 418 U.S. 405, 411 (1974).

[18] Appellants contend (Br. 36-41) that the ordinance is invalid because it results in a complete prohibition of "off-site" billboards, which, in turn, will have the effect of eliminating the outdoor advertising business in San Diego. It is not surprising that appellants have failed to cite a single opinion of this Court or any other federal court supporting the proposition that, for purposes of determining the reach of the police power, there is a constitutionally significant distinction between the "regulation" and "prohibition" of activity deemed to be contrary to the general welfare. See *John Donnelly & Sons* v. *George N. Campbell, Jr., supra,* slip op. 23. In *Goldblatt* v. *Town of Hempstead, supra,* this Court sustained an ordinance that had the effect of prohibiting a beneficial use to which the property had previously been devoted. 369 U.S. at 592. See also *Daniel* v. *Family Security Life Insurance Co.,* 336 U.S. 220 (1949). Appellants do cite (Br. 36-38) this Court's decision in *Young* v. *American Mini Theatres, Inc., supra,* for the proposition that a total ban on activity raises special constitutional concerns. But *Young* and the other decisions of the Court relied upon by appellants all arose under the First Amendment, one of the "specific constitutional limitations" on the exercise of the police power. *Berman* v. *Parker, supra,* 348 U.S. at 32. They do not suggest that there is a general substantive due process limitation on the power of a state or locality to ban an activity in the absence of a "specific constitutional limitation". The First Amendment question in this case is discussed in Part II, *infra.*

Many of the state cases striking down a prohibition on activities within a political subdivision, relied upon by appellants (Br. 38-39), rested on state statutory or constitutional law imposing such

II

ORDINANCE NO. 10795 IS NOT INVALID ON ITS FACE UNDER THE FIRST AMENDMENT

Appellants contend (Br. 18-33) that Ordinance No. 10795 is invalid on its face under the First Amendment because it will eliminate the outdoor advertising business —and with it a particular "medium" of communication— in the City of San Diego. But although the parties stipulated (J.S. App. 126a) that the ordinance will eliminate appellants' billboard *business*, the ordinance does not prohibit all outdoor advertising or expression of ideas by posters or signs. This medium of expression therefore is preserved, albeit in a form restricted in order to advance substantial governmental interests. Further, the record does not show that the information reaching the public will be significantly diminished by the ordinance.

It is important to emphasize once again the nature of the signs appellants contend may not be barred by the City. The California Supreme Court held that "the purpose of the ordinance is the prohibition of commercial billboards" (J.S. App. 4a n.2), and it therefore construed the ordinance as not reaching signs of a different character. Accordingly, the court held that the ordinance bars only permanent structures used predominantly for commercial advertising, but not, *e.g.*, picket signs or small signs in a person's front yard proclaiming a religious or political message.[19] Appellants have stipulated that the

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restrictions on subdivisions. See, *e.g.*, *U.S. Mining & Exploration Natural Resources Co.* v. *City of Beattyville*, 548 S.W. 2d 833 (Ky. 1977); *Gust* v. *Township of Canton*, 342 Mich. 436, 70 N.W.2d 772 (1955); *Reynolds* v. *Vulcan Materials Co.*, 279 Ala. 363, 185 So. 2d 386 (1966); *Township of Andover* v. *Lake*, 89 N.J. Super. 313, 214 A. 2d 870 (App. Div. 1965). To the extent other state court decisions cited by appellants found a general substantive due process limitation under the Fourteenth Amendment on the prohibition of previously lawful activity, they are incorrect.

[19] Appellants therefore are simply wrong in stating (Br. 32) that, under the ordinance, a landowner "may not even use signs on his own land to express his own views on matters not related to his products or services." The California Supreme Court did not

billboards to which the ordinance is directed—and the billboards they maintain—measure either 12 x 24 feet or 14 x 48 feet. Thus, it is clear that this case concerns only large, permanent structures used for the display of advertising—and only such structures that do not identify or relate to activities occurring on the premises where the sign is located.[20]

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purport to delineate the precise range of all the types and categories of on-premise and other signs not reached by the ordinance. It is not clear, for example, whether the ordinance would be construed to permit a corporation or other organization to construct a sign on its own premises proclaiming a political, religious, or other noncommercial message in the same fashion as an individual might do in the front yard of his residence. Cf. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978). These issues may properly await further development in the state courts, because appellants' signs concededly are within the reach of the ordinance.

In this regard, the Federal Highway Administration (FHWA) issued an advance notice of proposed rulemaking on September 29, 1980, soliciting comments on whether its regulations governing the exception for signs relating to activities occurring on the premises (23 U.S.C. 131(c); see 23 C.F.R. 750.709) should be clarified in their application to noncommercial activities. See 45 Fed. Reg. 64468 (1980). FHWA specifically asked for comments on whether the definition of the term "activity" in the on-premise exemption should be expanded "to allow individuals to erect signs with messages stating their personal views on their own property." *Id.* at 64469. See *Oklahoma ex rel. Dep't of Transportation* v. *Pile*, 603 P.2d 337 (Okla. 1979), petition for cert. pending, No. 79-1617.

There is no occasion in the present case, however, for the Court to consider what messages, if any, the First Amendment might require a state to permit a person to proclaim on his own premises (cf. *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 93-94 (1977)), because appellants have conceded (Br. 4-5) that their signs do not fall in the "on-premise" category, even if that category is broadly construed to include signs proclaiming a religious, political, or other noncommercial ~~nature~~ message. Their signs are located on property leased from others for the purpose of erecting billboards, which are in turn made available to third parties for advertising (*ibid.*).

[20] This is not to say, of course, that a ban on smaller, temporary signs would not also be permissible in the context of an ordinance, designed to comply with the federal Act, that did not impose a City-wide ban.

Moreover, the California Supreme Court made clear that, although it sustained the ordinance on its face, it was prepared to entertain an argument that the ordinance could not constitutionally be applied to a particular advertiser who could demonstrate an absence of reasonable alternative means of communicating, such as newspapers, magazines, radio, television, and on-site billboards.[21] The decision below therefore does not foreclose arguments by the unspecified number of persons who appellants claim (Br. 31) use billboards because alternative means of advertising are unduly expensive[22] or inadequate.

A. The Ordinance Furthers Important Governmental Interests And Addresses Unique Problems Posed By Commercial Billboards

In Point I, we have explained how Ordinance No. 10795 furthers the substantial governmental interests

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[21] For example, this case does not involve any claim of a need to display information for motorists regarding the availability of food, lodging, gasoline, and other services along the highway. Cf. *John Donnelly & Sons* v. *George N. Campbell, Jr., supra*, slip op. 9-11. Newspapers, television, radio, and on-site billboards may not satisfy the motorist's need for such information, see, *e.g., Linmark Associates, Inc.* v. *Willingboro, supra*, 431 U.S. at 93, and such information more closely relates to the use of the highway than does, *e.g.*, national brand advertising. *Consolidated Edison Co.* v. *Public Service Comm'n*, No. 79-134 (June 20, 1980), slip op. 1-2 (Stevens, J., concurring). The Highway Beautification Act of 1965 accommodates this interest by directing the Secretary to provide for areas within the right-of-way of highways in the Interstate or primary system where signs "giving specific information in the interest of the traveling public may be erected and maintained." 23 U.S.C. 131(f). See also 23 U.S.C. 131(c)(1), (i), (*o*) and (q). Although the San Diego ordinance does not contain a comparable provision, it should be noted that the need for directional information in urban areas is quite different from that in rural areas where the directional sign provisions of the federal Act have their primary application.

[22] We do not mean to suggest, however, that a state or locality must allow the erection of a billboard merely because it is less expensive than other means of communication. We suggest only that this question may be resolved in the context of a claim by a particular advertiser.

in improving the aesthetic quality of the city, thereby attracting visitors and protecting public and private investment in buildings and open spaces, and in promoting traffic safety. That discussion need not be repeated here. This Court long has recognized the special problems posed by commercial billboards. See page 11, *supra*. And few would question the judgment of the City of San Diego—not to mention Congress, the legislatures of the 50 states, and numerous local jurisdictions—that billboards impair the landscape and disrupt the peaceful enjoyment of the environment. We believe it clear that the First Amendment, as applied to the states through the Fourteenth Amendment, does not bar a locality from pursuing environmental and related objectives in the manner San Diego has chosen.

Appellants concede (Br. 22) that billboards pose unique problems. Nonetheless, comparing this case to those involving leafletting, door-to-door solicitations, and sound trucks, appellants contend (Br. 22-24) that the City could not eliminate all off-premise billboards. But billboards hardly can be compared to these other manners of expression. As the California Supreme Court observed (J.S. App. 24a):

> Unlike leaflets, newspapers, and the like, a billboard is a large, immobile, and permanent structure which like other structures is subject to zoning regulation. The city's right to regulate the commercial use of property, and to ban uses which imperil traffic safety or denigrate the appearance of the community justifies restrictions which go beyond those imposed upon more transitory or less obtrusive media.

It is true that the Court held in *Schneider* v. *State*, 308 U.S. 147, 162 (1939), that a city's interest in preventing litter did not justify an ordinance prohibiting a person from handing leaflets to others willing to receive them; in the Court's view, litter prevention could be accomplished adequately by punishing those who actually throw paper on the ground. But because of their permanent nature, billboards cannot be viewed and then discarded out of the view of those who prefer an uncluttered landscape. Billboards themselves have been determined to be a type of

"litter" on the landscape, and control of that problem necessarily requires a prohibition against their erection in the first place. These aesthetic concerns are unrelated to the suppression of free expression. *Linmark Associates, Inc.* v. *Willingboro, supra,* 431 U.S. at 93-94; *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968).[23]

Likewise, because of their permanent and obtrusive nature, billboards cannot selectively reach only willing recipients of their messages, *Schneider* v. *State, supra,* 308 U.S. at 162, or effectively withhold their messages from those who express a desire not to receive it. *Consolidated Edison Co.* v. *Public Service Comm'n, supra,* slip op. 11 n.11; *Rowan* v. *Post Office Department,* 397 U.S. 728 (1970); *Kovacs* v. *Cooper, supra,* 336 U.S. at 86; *Martin* v. *Struthers,* 319 U.S. 141, 143, 147-148 (1943). Nor can individuals traveling the highways endure only a "short exposure" to billboard displays and then discard them, as they can with bill inserts or leaflets, *Consolidated Edison Co.* v. *Public Service Comm'n, supra,* slip op. 10-

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[23] The Court stated in *O'Brien* that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." 391 U.S. at 376. We do not suggest, of course, that the message carried on a billboard is "symbolic speech" like the burning of a draft card at issue in *O'Brien.* But this cannot obscure the fact that the manner of expression in the present case entails a significant nonspeech element in the erection of a large, permanent structure that, but for the message on its surface, concededly is subject to broad state regulation or prohibition. This nonspeech element, moreover, does not involve personal conduct such as picketing (*Cox* v. *Louisiana,* 379 U.S. 559 (1965)), or the contribution of money (*Buckley* v. *Valeo,* 424 U.S. 1, 16-17 (1976)), that closely identifies the individual with the message he expresses. Nor, in the circumstances of the present case, does the nonspeech element implicate whatever individual autonomy is entailed in the proclaiming of a message on one's person (*Cohen* v. *California,* 403 U.S. 15 (1971); *Tinker* v. *Des Moines School District,* 393 U.S. 503 (1969)) or property (*Linmark Associates, Inc.* v. *Willingboro, supra,* 431 U.S. at 93). See *Young* v. *American Mini Theatres, Inc., supra,* 427 U.S. at 78 n.2 (Powell J., concurring).

11, or turn a dial to avoid the message, as they can with radio and television, *Packer Corp.* v. *Utah*, *supra*, 285 U.S. at 110. And given the proliferation of billboards, it is not fair to suggest that the offended viewer may avoid further bombardment simply by averting his eyes. *Consolidated Edison Co.* v. *Public Service Comm'n*, *supra*, slip op. 11; *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 211 (1975); *Cohen* v. *California*, 403 U.S. 15, 21 (1971).[24]

Nor can the erection of billboards along public thoroughfares be compared to the historical use of parks and streets "for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *C.I.O.*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.). Billboards afford no opportunity for the assembly or exchange of views inherent in the use of parks and sidewalks as public forums. *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 303-304 (1974) (opinion of Blackmun, J.).[25] As the First Circuit stated,

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[24] Billboards differ from leaflets in another way: they necessarily compete for alternative uses of scarce resources—land adjacent to the highway and the line of sight from the highway. Cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 396-400 (1969). The nature of billboards is such that they may disrupt the view and enjoyment of the landscape for a considerable distance, perhaps the entire range over which they can be viewed. For this reason, the mere spacing of billboards appellants urge (Br. 29-30 & n.*, 37-38) may not sufficiently further the important governmental interest in enhancing natural beauty and protection of the environment. See generally C. Floyd & P. Shedd, *supra*, at 95-98.

[25] Justice Douglas observed in his concurring opinion in *Lehman* that "a streetcar or bus is plainly not a park or sidewalk or other meeting place for discussion, *any more than is a highway*. It is only a way to get to work or back home" (418 U.S. at 306; emphasis added). In concluding that the city was not required to carry political advertisements on its buses and streetcars, Justice Douglas reasoned that "[b]us and streetcar placards are in the category of highway billboards" (*ibid.*), and he noted with approval the adoption of state legislation pursuant to the Highway Beautification Act of 1965 "to protect the interests of * * * motorists" by imposing "strict regulation of highway advertising" (418 U.S. at 306; see also *id.* at 307-308, quoting *Packer Corp.* v. *Utah*, *supra*.

"[t]he use of land adjoining the highway for commercial advertising is really the use of the highway itself," and highways are " 'created for a quite different purpose by the expenditure of public money * * *.' " *John Donnelly & Sons* v. *George N. Campbell, Jr., supra*, slip op. 21, quoting *General Outdoor Advertising Co.* v. *Department of Public Works*, 289 Mass. 149, 169, 193 N.E. 799, 808 (1935). *Markham Advertising Co.* v. *State*, 73 Wash. 2d 405, 426-427, 439 P.2d 248, 261-262 (1968), appeal dismissed, 393 U.S. 316 (1969). "As such they are to be distinguished from parks or other facilities created for general use, and weight should be given to the state's right to restrict the state-created incidental benefits" (*John Donnelly & Sons* v. *George N. Campbell, Jr., supra*, slip op. 21-22). Billboard control therefore serves to confine the use of the highways to the purposes for which they are intended and for which the public investment was made. Cf. *Greer* v. *Spock*, 424 U.S. 828, 836-837 (1976). Moreover, appellants can claim no special privilege to engage in their business of outdoor advertising along public thoroughfares. "The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary and, generally at least, may be prohibited or conditioned as the legislature deems proper." *Packard* v. *Banton*, 264 U.S. 140, 144 (1924); see also *Railway Express Agency, Inc.* v. *New York, supra*, 336 U.S. at 115-117 (Jackson, J., concurring).

For the foregoing reasons, San Diego's ordinance advances significant governmental interests in addressing the unique problems posed by erection and maintenance of commercial billboards.

B. The San Diego Ordinance Is A Valid Regulation Of The Time, Place, And Manner Of Advertising

As this Court has noted, "the right to communicate is not limitless." *Carey* v. *Brown*, No. 79-703 (June 20,

1980), slip op. 14. The exercise of free speech rights—whether the message is commercial or noncommercial [26]

[26] We assume that appellants' billboards and the billboards affected by the San Diego ordinance generally carry a far greater number of commercial messages than noncommercial ones, just as did the billboards involved in the Maine litigation. See note 7, *supra*. The Constitution affords less protection to commercial speech than to other varieties of speech. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, No. 79-565 (June 20, 1980), slip op. 4-6; *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 455-457 (1978). Based on this distinction, the First Circuit concluded that a state could impose a state-wide ban on billboards carrying commercial messages, at least where there was some provision for on-premise and other signs to inform the motoring public of available travel services. *John Donnelly & Sons* v. *George N. Campbell, Jr., supra*, slip op. 9-11, 20-21, 24-25. The First Circuit struck down the Maine statute, however, because it did not, in the court's view, make adequate provision for display of political, social, cultural, and other noncommercial expression. *Id.* at 25-27.

In arguing that the San Diego ordinance is invalid even as applied to commercial advertisements, appellants rely (Br. 28-29) solely on this Court's decision in *Central Hudson Gas & Electric Co.* v. *Public Service Comm'n*, No. 79-565 (June 20, 1980). But *Central Hudson* involved a flat prohibition on promotional advertising, not a regulation of the manner of its presentation (see slip op. 12-13), and the prohibition was imposed for the purpose of suppressing information in order to affect private economic decisions (*id.* at 1-5, Blackmun, J., concurring; see also *Linmark Associates, Inc.* v. *Willingboro, supra*, 431 U.S. at 96). In the present case, San Diego has not prohibited promotional advertising or sought to suppress its message. The City simply has regulated the place and manner of such advertising. Cf. *Schaumberg* v. *Citizens for a Better Environment*, 444 U.S. 620, 628-632 (1980); *Breard* v. *Alexandria*, 341 U.S. 622, 641-645 (1951); *id.* at 649-650 & n.* (Black, J., dissenting); *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942).

In any event, the San Diego ordinance, as construed by the California Supreme Court, satisfies many of the concerns the First Circuit expressed respecting the effect of the Maine statute on noncommercial messages. The San Diego ordinance applies only to permanent structures in the nature of commercial billboards (J.S. App. 4a n.2) and therefore would appear to permit temporary signs proclaiming political messages of the type that the Maine statute prohibited. *John Donnelly & Sons* v. *George N. Campbell, Jr., supra*, slip op. 26-27. Political campaign signs may be erected three months prior to the election (§ 101.0700F 11, 12; J.S. App. 112a),

—may be limited by reasonable time, place and manner regulation. *Consolidated Edison Co.* v. *Public Service Comm'n, supra,* slip op. 4-5; *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 209 (1975); *Kovacs* v. *Cooper,* 336 U.S. 77 (1949).[27] Such regulation is permissible because "various *methods* of speech, regardless of their content, may frustrate legitimate governmental goals." *Consolidated Edison Co.* v. *Public Service Comm'n, supra,* slip op. 5 (emphasis added). "Independently of the message * * * convey[ed], the form of [a] communication may be offensive—perhaps because it is too loud *or too ugly* in a particular setting." *Id.* at 3 (Stevens, J., concurring; emphasis added); see also *Grayned* v. *City of Rockford,* 408 U.S. 104, 115-118 (1972). In *Kovacs* v. *Cooper, supra,* for example, the Court held that a city could regulate the manner of speech by prohibiting the use on city streets of sound trucks or other amplifying devices emitting "loud and raucous noises." The San Diego ordinance is similar in that it prohibits a manner of speech—commercial billboards—that

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not the mere three weeks allowed under the Maine statute (slip op. 25-26). And finally, although the First Circuit noted (slip op. 26) that the "on-premise" exemption was not available for political messages under the Maine statute, the California Supreme Court made clear (J.S. App. 4a n.2) that an individual can proclaim such messages in a sign on his own premises.

The Highway Beautification Act of 1965 is somewhat broader than the San Diego Ordinance, because the former does not exempt temporary signs or those proclaiming a political message. But because the federal Act allows states to permit signs in commercial and industrial zones, and therefore does not require a state-wide ban, it does not appear to be inconsistent with the First Circuit's opinion. As noted above, moreover, the Federal Highway Administration is considering whether the exception for on-premise signs outside of commercial and industrial zones should include signs proclaiming a personal message of the owner. See note 19, *supra.*

[27] The ordinance manifestly regulates the place and manner of communication. A person may proclaim his message to the public through outdoor advertising on his own premises (J.S. App. 4a n.2; J.S. App. 107a (§ 101.0700B)), but may not proclaim that message on a billboard located elsewhere. And other manners of advertising—radio, television, magazines, newspapers, handbills—are unaffected.

amplifies a message, albeit visually rather than aurally. *Lehman* v. *City of Shaker Heights, supra*, 418 U.S. at 307 (Douglas, J., concurring). For this reason, the City likewise could conclude that billboards would disrupt traffic (336 U.S. at 87 (opinion of Reed, J.)) and interfere with peaceful enjoyment of the environment (*id.* at 81, 87). And, unlike soundtrucks, billboards are permanent fixtures on the landscape.

Of course, to pass muster, a time, place, and manner restriction on expression must serve a significant governmental interest and leave alternative channels for communication and must not be based on the content of the message. *Consolidated Edison Co.* v. *Public Service Comm'n, supra*, slip op. 4-5. As explained elsewhere (see pages 10-17, *supra*), the San Diego ordinance plainly serves significant governmental interests. It is equally clear that the ordinance is constitutional because it leaves available reasonable alternative means of advertising.

Although the parties stipulated that "many" businesses and politicians and other persons rely on billboards to advertise because other forms of advertising are "insufficient, inappropriate and prohibitally expensive" (J.S. App. 126a), such a vague stipulation cannot form the basis for holding the ordinance unconstitutional. We do not know from the stipulation how many persons are in this category or why or to what extent they may regard forms of advertising other than billboards to be "insufficient" or "inappropriate." Surely, for example, an advertiser's own tastes or preference for billboards would not outweigh the important public interest in billboard control where reasonable but marginally less effective alternatives exist. We also do not know how many of the persons who supposedly find other means of advertising "prohibitally expensive" are commercial establishments (or others) who merely do not find other methods of advertising marginally cost effective in particular situations [28] and, on the other hand, how many are individuals

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[28] As pointed out above (see note 8, *supra*) on a national basis, only 1.1% of all advertising expenditures were for outdoor advertising in 1976 through 1978. This indicates that the total

or organizations that do not have the resources to use other forms of advertising even if they wanted to. Only the latter, presumably, could make a compelling case for special consideration.

We note as well that the stipulation regarding alternative methods of advertising was entered into in 1974 (J.S. App. 127a), before the ordinance was amended in 1977 (J.S. App. 3a n.1) to permit temporary political campaign signs. It therefore appears that politicians and those supporting them—one of the groups of noncommercial advertisers for whom appellants express special concern (Br. 7-8, 31)—will have the opportunity to present outdoor advertising. The joint stipulation was also entered into before the California Supreme Court gave the ordinance a narrowing construction to leave untouched signs other than commercial billboards and comparable permanent structures. This construction may permit the erection of smaller or less permanent signs conveying the type of political, social, religious and other noncommercial messages appellants suggest will be affected by the ordinance (see Br. 31-32)—although these noncommercial messages will not be carried on billboards maintained by appellants. And, of course, on-premise commercial advertising is permitted. Thus, although the ordinance might result in the elimination of appellants' advertising *business* in San Diego, it does not bar outdoor advertising or expression of ideas.[29]

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volume of advertising reaching the public will not be significantly diminished by further restrictions on billboards. Moreover, almost two-thirds of this advertising was national, rather than local, in nature. Bureau of the Census, U.S. Department of Commerce, *Statistical Abstract of the United States* 595 (1979). For this type of advertising, as the First Circuit noted, although billboard companies "tout the special qualities of roadside promotion, the dollar statistics and judicial notice both point to ample alternatives." *John Donnelly & Sons* v. *George N. Campbell, Jr., supra,* slip op. 20.

[29] Appellants err in relying (Br. 37-38) on *Young* v. *American Mini Theatres, Inc., supra,* for the argument that the City could not eliminate their advertising business. The opinions of Justice Stevens and Justice Powell observe that the ordinance respecting location of adult movie theatres would have raised a serious ques-

In short, there is no basis for concluding that there are not reasonably adequate means of expression—outdoor displays as well as newspaper, radio, leafletting, etc. —other than appellants' billboards for the vast majority of advertisers whose interests underlie appellants' case. And if there are situations in which there are no reasonable alternatives to proclaiming a message on the type of sign barred by the ordinance, the California Supreme Court indicated that it would entertain the argument that the ordinance could not constitutionally be applied in those circumstances. Accordingly, the ordinance cannot be thought to be a facially invalid time, place and manner regulation because of a supposed absence of reasonable alternative means of expression.

Finally, the San Diego ordinance is not impermissibly based on the content of the particular message that would be displayed; it is the billboard itself that is objectionable. *John Donnelly & Sons* v. *George N. Campbell, Jr., supra,* slip op. 6. Appellants argue (Br. 32) that the ordinance is not content-neutral because it exempts on-site signs and signs advertising the premises for sale, lease, or rent. Contrary to appellants' argument, however, these exemptions are based on the place where the advertising occurs, not its content. Billboards advertisting goods and services may be placed only on premises where the goods are produced or sold or where the services are rendered. Comparable signs offering real estate for sale may be placed only on that real estate and therefore are also a type of on-premise sign.[30]

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tion if it significantly restricted access to the films (427 U.S. at 71 n.35, 77). But what concerned the Court in those opinions was access to the expression (the films), not the place where they are displayed (the theatre). So too here, if the public's access to information now carried on appellants' billboards is not significantly curtailed, access to the particular place of display (the billboards) is not so important.

[30] Other exceptions in the ordinance—*e.g.*, for bench signs at public transit stops, religious symbols, historical plaques, signs on commercial vehicles, and temporary subdivision directional signs

The distinction between on and off-premise signs is firmly rooted in common sense and attributes of property ownership and does not offend the First Amendment. See *Young* v. *American Mini Theatres, Inc., supra*, 427 U.S. at 68 (opinion of Stevens, J.); *Railway Express Agency, Inc.* v. *New York, supra*, 336 U.S. at 109-110. On-premise signs are "in actuality a part of the business itself, just as the structure housing the business is a part of it," *United Advertising Corp.* v. *Borough of Raritan, supra*, 11 N.J. at 150, 93 A.2d at 365 (Brennan, J.), and permitting them is a logical extension of authorizing the business on the property. Moreover, a sign offering goods for sale on the premises, or offering the premises themselves for sale, is often the most effective method of advertising and involves less expense and greater autonomy than other methods. *Linmark Associates, Inc.* v. *Willingboro, supra*, 431 U.S. at 93; *John Donnelly & Sons* v. *George N. Campbell, Jr., supra*, slip op. 19; *Newman Signs, Inc.* v. *Hjelle*, 268 N.W. 2d 741, 758-759 (N.D. 1978), appeal dismissed, 440 U.S. 901 (1979). *Board of Adjustment* v. *Osage Oil & Transp., Inc.*, 258 Ark. 91, 522 S.W.2d 836, cert. denied and appeal dismissed, 423 U.S. 941 (1975); *E. B. Elliott Advertising Co.* v. *Metropolitan Dade County*, 425 F.2d 1141, 1153-1154 (5th Cir.), cert. dismissed, 400 U.S. 805 (1970).[31]

(J.S. App. 111a-112a)—do not appear to be real exceptions at all, in view of the manner in which the California Supreme Court construed the ordinance. They are merely among the general category of temporary or less obtrusive signs that are not covered by the ordinance irrespective of their content.

[31] Amicus ACLU also argues (Br. 13) that the ordinance is content-based because it permits temporary political campaign signs but not other ideological speech. This assertion ignores the California Supreme Court's interpretation of the ordinance as not reaching signs distinct from commercial billboards, including, *e.g.*, signs in one's yard proclaiming a religious or political message.

CONCLUSION

The judgment of the California Supreme Court should be affirmed.

Respectfully submitted.

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